

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

KALEB COLE,

Defendant.

NO. CR20-032JCC

**GOVERNMENT'S MOTION *IN*  
*LIMINE* TO PERMIT THE  
UNDERCOVER OFFICER TO  
TESTIFY UNDER A PSEUDONYM**

NOTE ON MOTION CALENDAR:  
September 27, 2021

The United States of America, by and through Tessa M. Gorman, Acting United States Attorney for the Western District of Washington, and Thomas M. Woods and Seth Wilkinson, Assistant United States Attorneys for said District, respectfully moves *in limine* to permit the undercover officer in this matter to testify under a pseudonym and that additional precautions be taken to protect the officer's identity.

**BACKGROUND**

As set forth in the government's trial brief, an undercover officer and a confidential human source ("CHS") met with Cole at his house to discuss the plot in this case. During the meeting, Cole acknowledged his role in the plot, and identified two of the victims that were later targeted. The officer and the CHS were wearing recording devices. At trial, the government intends to call the undercover officer primarily to authenticate the recordings.

The government will also elicit from the officer how he was introduced to Cole. Finally, the government will call the officer to authenticate a separate recording of Cole in which he made statements at an Atomwaffen meeting that link him to the moniker, पकजबतचषथबल, that Cole used in the encrypted chats to plan and coordinate the plot.

The government has two independent concerns about the undercover officer testifying under his true name. First, extremists have targeted him, attempting to find out his true identity. On September 10, 2021, someone posted on social media a picture of the undercover officer (he was masked) attending an Atomwaffen gathering. The user stated:

The man circled in red is an undercover FBI agent (not an informant, an undercover employee) named "Gibson" who ran the tech for Atom Waffen Division in 2018 and 2019.

In my reporting I have have heard from three witnesses that he drugged a mentally ill teenage boy who is now facing federal conspiracy charges.

The user made other allegations, and then stated:

This man is an undercover FBI agent, NOT an informant. His alleged actions were illegal and the cases he is involved in require a second look.

I have had no luck identifying who this agent is and have hit a wall in the article I am writing about this. I have no way to contact his victims while retaining journalistic privileges (they're incarcerated or in psychiatric facilities, so their communications are monitored).

1 The user then asked others to contact him with any information about the undercover  
2 officer's identity.<sup>1</sup>

3 This post is concerning for three reasons. First, the Southern Poverty Law Center has  
4 identified the poster as a neo-Nazi extremist, who, among other things, participated in the  
5 infamous "Unite the Right" rally in Charlottesville, Virginia, in 2017. Second, the effort to  
6 publicize the identity of the undercover officer is particularly concerning, given that  
7 Atomwaffen members have been linked to multiple acts of violence, including murder.  
8 Third, the effort to publicize the undercover officer's identity also is concerning given the  
9 nature of the conduct in this case. In this conspiracy, Cole and other Atomwaffen members  
10 attempted to harass journalists and other people in an attempt to silence and intimidate them.  
11 The effort to target the undercover officer is simply a continuation of that course of conduct.

12 In addition, the undercover officer is currently involved in an unrelated operation in  
13 which he is meeting with targets face-to-face. If the officer's identity were publicly exposed,  
14 it could seriously jeopardize that investigation, and his personal safety.

15 In light of these concerns, the government requests that the Court permit the  
16 following:

17 1. The undercover officer be permitted to testify at trial using a pseudonym  
18 without publicly disclosing his true identity;

19 2. The defense be prohibited from asking the undercover officer any questions  
20 seeking personal identifying information (to include name, contact information, or date or  
21 place of birth);

22 3. The defense shall be prohibited from asking any questions about other  
23 investigations in which the undercover officer may be involved, including any ongoing  
24 investigations;

25 4. No public disclosure of any audio recording, or similar reproduction of the  
26 voices or visual images of the undercover officer while testifying, shall be permitted;

27  
28 <sup>1</sup> Needless to say, the poster's allegations about the undercover officer are completely frivolous.



1       The Confrontation Clause does not require that a jury hear a witness's true name, as  
 2 the Supreme Court recognized in *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986), when  
 3 it held that "trial judges retain wide latitude insofar as the Confrontation Clause is concerned  
 4 to impose reasonable limits on such cross-examination based on concerns about, among  
 5 other things, harassment, prejudice, confusion of the issues, the witness's safety, or  
 6 interrogation that is repetitive or only marginally relevant."

7       In a similar vein, courts have observed that "where there is a threat to the life of the  
 8 witness, the right of the defendant to have the witness's true name, address, and place of  
 9 employment is not absolute." *United States v. Palermo*, 410 F.2d 468, 472 (7th Cir. 1969)  
 10 (citing *United States v. Varelli*, 407 F.2d 735 (7th Cir. 1969)); *see also Clark v. Ricketts*, 958  
 11 F.2d 851, 855 (9th Cir. 1991); *Siegfriedt v. Fair*, 982 F.2d 14, 18 (1st Cir. 1992); *United*  
 12 *States v. Contreras*, 602 F.2d 1237, 1238-40 (5th Cir. 1979) (where there was reasonable  
 13 fear the disclosure of DEA agent's home address and frequented locations would endanger  
 14 him and his family, no error in precluding cross-examination as to home address and other  
 15 background information even though agent was "instrumental in defendant's arrest"); *United*  
 16 *States v. Maso*, No. 07-10858, 2007 WL 3121986, \*4 (11th Cir. Oct. 26, 2007) (per curiam)  
 17 (unpublished) ("The district court did not violate [the defendant's] right to confront  
 18 witnesses by allowing the [cooperating witness] to testify using a pseudonym."); *Brown v.*  
 19 *Kuhlman*, 142 F.3d 529, 532 n.3 (2d Cir. 1998) (undercover detective who testified in closed  
 20 courtroom due to safety concerns was permitted to testify using his badge number instead of  
 21 his true name).

22       Courts have approved alias testimony in multiple contexts. *See United States v.*  
 23 *Neuner*, No. 4:12-CR-050-A, 2014 WL 4493631, at \*2 (N.D. Tex. Sept. 11, 2014)  
 24 (permitting an FBI undercover officer to testify under a pseudonym in a gun case); *United*  
 25 *States v. Dumeisi*, Case No. 03-cr-664, Doc. 83 at 1 (N.D. Ill. Jan. 2, 2004) (permitting  
 26 government witness to testify under a pseudonym and appear in light disguise, and  
 27 prohibiting questioning about the witness's current or former address); *United States v. El-*  
 28 *Mezain*, 664 F.3d 467, 492 (5th Cir. 2011) (finding a "serious and clear need to protect the

1 true identities” of the two Israel Security Agency witnesses who testified by pseudonym);  
2 *United States v. Abu Ali*, 395 F. Supp. 2d 338, 344 (E.D. Va. 2005) (permitting use of  
3 pseudonyms by witnesses who testified during a pre-trial Rule 15 deposition that was  
4 conducted via satellite real-time video from Saudi Arabia to the federal courthouse in  
5 Alexandria, Virginia); *United States v. Calderon*, Case No 2:14-cr-103, Doc. 58 (C.D. Cal.  
6 April 23, 2015) (authorizing the complete withholding from the defense of identifying  
7 information as to multiple undercover officers).

8 The use of a pseudonym is similarly appropriate in this case. In the age of social  
9 media, an image or name can easily be publicly searched for the true identifying information  
10 of the officer. In this case particularly, there is an acute concern that the officer will be  
11 subject to harassment and the threat of violence. Moreover, he may no longer be able to  
12 function as an undercover officer.

13 Balanced against these interests, the use of a pseudonym by the officer will not  
14 prejudice the defendant’s confrontation rights. It is the officer’s interactions with the  
15 defendant—not his personal identity—that makes his testimony relevant at trial. Because the  
16 defendant has only known the officer by his pseudonym throughout the investigation,  
17 withholding the officer’s true identity will not detract from substance of the questioning on  
18 cross-examination and will not impair the defendant’s Sixth Amendment right to confront  
19 the witnesses against them. The officer will be present in the courtroom, so the defendant  
20 will be able to confront him. The jury, moreover, will be able to observe and assess the  
21 officer’s demeanor while testifying. Finally, the officer’s testimony largely will be limited to  
22 authenticating recordings—an issue that is highly unlikely to be in dispute in the trial.

23 //

24 //

25 //



1 In sum, disclosing the undercover officer's identity would pose a risk to the safety of  
2 the undercover officer and undermine the security of other investigations. The Court should  
3 allow the officer to testify under the conditions set forth above.

4 Dated this 17th day of September, 2021.

5 Respectfully submitted,

6 TESSA M. GORMAN  
7 Acting United States Attorney

8 /s/ Thomas M. Woods  
9 THOMAS M. WOODS  
10 SETH WILKINSON  
11 Assistant United States Attorneys  
12 United States Attorney's Office  
13 700 Stewart Street, Suite 5220  
14 Seattle, Washington 98101-3903  
15 Phone: 206-553-7970  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28